United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7355 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RUTH E. BUCK,

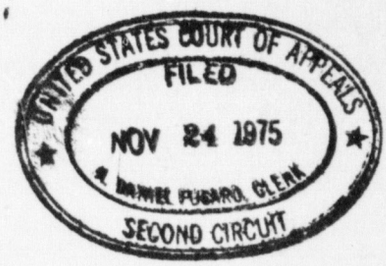
Appellant,

-against-

THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK; THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: IRVING ANKER, individually and as Chancellor of Schools of the City of New York; THE COMMUNITY SCHOOL BOARD OF SCHOOL DISTRICT #25, QUEENS; THE PRESIDENT'S COUNCIL, DISTRICT #25, QUEENS; DOROTHY KAYE, Individually and as President of the President;s Council, District #25; and others whose identities are unknown,

Appellees.

75-7355 P/S



BRIEF ON BEHALF OF APPELLEES PRESIDENT'S COUNCIL, DISTRICT #25, QUEENS, AND DOROTHY KAYE, INDIVIDUALLY AND AS PRESIDENT OF THE PRESIDENT'S COUNCIL, DISTRICT #25

STANLEY POSESS
Attorney for Appellees
PRESIDENT'S COUNCIL, DISTRICT #25, QUEENS, and DOROTHY KAYE

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STANLEY POSESS
Attorney for Appellees
PRESIDENT'S COUNCIL, DISTRICT #25, QUEENS, and DOROTHY KAYE
217 Broadway
New York, New York 10007
(212) 267-7570

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IS A SUBSTANTIAL FEDERAL QUESTION PRESENTED BETWEEN PLAINTIFF RUTH E. BUCK (BUCK) AND THE PRESIDENT'S COUNCIL, DISTRICT #25, QUEENS, AND DOROTHY KAYE, INDIVIDUALLY AND AS PRESIDENT OF THE PRESIDENT'S COUNCIL, DISTRICT #25?

POINT I

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. 1985(3).

POINT II

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. 1983.

STATEMENT OF THE CASE

RUTH E. BUCK (BUCK) instituted suit, pro se, in the Eastern District Court, for injunctive and declaratory relief and for punitive damages against Appellees PRESIDENT'S COUNCIL, DOROTHY KAYE (KAYE), and others, pursuant to Title 42 U.S.C. 1983, 42 U.S.C. 1985(3), 28 U.S.C. 1343 and 28 U.S.C. 1441(3). Her claim against the defendants PRESIDENT'S COUNCIL and KAYE was confined to an action for damages for their role in allegedly depriving plaintiff of an equal opportunity to be elected to the COMMUNITY SCHOOL BOARD of District 25, Queens, in the election held on May 6, 1975.

The complaint was dismissed in the court below on motion of counsel for the appellees other than appellees PRESIDENT'S COUNCIL and KAYE. However, counsel for the named appellees joined in said motion to dismiss and submitted an affidavit in support thereof with leave of the court. The dismissal was grounded on:

(1) lack of a substantial federal question;

(2) preclusion of the Federal courts from assuming jurisdiction over Municipal Corporations and their subdivisions;

(3) abstention of federal courts until state remedies have been exhausted.

This brief will largely confine itself to the first-stated ground for dismissal, to wit, the failure of the complaint to raise a substantial federal question as between plaintiff BUCK

and defendants PRESIDENT'S COUNCIL and KAYE.

POINT I

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. 1985(3).

Section 1985(3) reads as follows:

> "Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. § 1980.)

The courts have held that pleadings in a civil rights action should receive a liberal construction. However, if there is no

basis for the claim, the action must be dismissed. FURUMOTO v. LYMAN, 362 F. Supp. 1267 (N.D. CAL 1973); WALLE v. DALLETT, 136 F. Supp. 102 (S.D.N.Y. 1955).

Merely designating her claim as a Civil Rights action will not save it if in fact the allegations of the complaint fail to merit the label applied.

This court has held that to properly state a cause of action for conspiracy under Sec. 1985(3) two pleading requirements must be met, viz.: BIRNBAUM v. TRUSSELL, 347 F. 2d 86 (2nd Cir. 1965); POWELL v. WORKMEN'S COMPENSATION BOARD, 317 F. 2d 131, 133 (2nd Cir. 1964).

1. Plaintiff must specify with some degree of particularity the overt acts which defendants engaged in that were reasonably related to the claimed conspiracy to deprive her of the equal protection of the laws or of equal privileges and immunities under the laws. POWELL v. WORKMEN'S COMPENSATION BOARD, supra; VALLEY v. MAULE, 297 F. Supp. 958, 960 (D.C. CONN. 1968); SNOWDEN v. HUGHES, 321 U.S. 1; BIRNBAUM v. TRUSSELL, 371 F. 2d 672 (2nd Cir. 1966); SPAMINATO v. M. BREGER & CO., 270 F. 2d 46, 49 cert. denied 361 U.S. 944, 80 S. Ct. 409, 4 L. Ed 2d 363.

2. Plaintiff must set forth facts showing a purposeful discrimination in the deprivation of her constitutional rights. VALLEY v. MAULE, supra; SNOWDEN v. HUGHES, supra; HOFFMAN v. HALDEN, 268 F. 2d 280, 290 (9th Cir. 1959); BURT v. CITY, 156 F. 2d 791, 792 (2nd Cir. 1946); NEGRICH v. HOHN, 379 F. 2d 213 (3rd Cir. 1967).

Bearing in mind that an unequal application of the law does not constitute a violation of Sec. 1985(3) even if it is malicious (BIRNBAUM, SNOWDEN, HOFFMAN, supra), a review of plaintiff's complaint reveals its utter failure to comply with the aforementioned requirements.

At the outset, the complaint as to defendants COUNCIL and KAYE does not allege material facts indicating that they acted in conjunction with the other appellees in a conspiracy to deprive plaintiff of her constitutional rights based upon plaintiff's race and/or religious beliefs. A discriminatory purpose cannot be presumed, TARRANCE v. FLORIDA, 188 U.S. 519, 520, and it must be a "clear and intentional discrimination". GUNDLING v. CITY OF CHICAGO, 177 U.S. 183; AH SIN v. WITTMAN, 198 U.S. 500, 507, 508; BAILEY v. ALABAMA, 219 U.S. 219, 231. (Plaintiff's Appendix Pgs. 26 through 35.*) Her complaint states wholly vague and conclusory allegations respecting such a conspiracy and the only nexus to be found between the alleged conspirators is that some of them are Jewish (App. Pgs. 29, 33) and that defendant KAYE and other parent association leaders supported a specific slate of candidates pursuant to Circular 57 issued by the defendant BOARD OF EDUCATION and the rulings of defendant IRVING SHANKER (App. Pg. 31).

Similarly, the bare allegations that defendant KAYE and other parent association members formed a separate committee to promote a slate of candidates (Pltf. App. Pg. 31, 32) is not a proper allegation of an actionable conspiracy under 1985(3).

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* (Hereinafter designated as [App.])

Such action was not prohibited under Circular 57 (App. Pg. 20); indeed, such a prohibition would constitute an infringement upon the constitutional rights of those parents.

Plaintiff's complaint relies heavily upon the various Candidates Nights held in District 25 at the direction of the COMMUNITY SCHOOL BOARD and under the auspices of the PRESILENT'S COUNCIL and the various parent associations (App. Pg. 21). However, her complaint fails again to allege any purposeful discrimination resulting in a deprivation of her constitutional rights. She does not claim that she alone was singled out by appellee KAYE and prevented from handing out her literature (App. Pg. 34) since this prohibition was applied to all of the candidates equally. This court should not permit itself "to be thrust into the details" of this election, POWELL v. POWER, 436 F. 2d 84, 86, where the actions complained of demonstrate at best an unequal application of the law and at the worst are not legally actionable.

Assuming, arguendo, that the defendants PRESIDENT'S COUNCIL and KAYE erred in their attempt to comply with Circular 57 and the Education Law, there is nothing in this complaint that demonstrates that essential element of intentional or purposeful discrimination or class based, invidiously discriminatory animus with reference to the plaintiff and without that element there is no constitutional denial of equal protection. The complaint is devoid of any material facts demonstrating any discrimination against plaintiff by these defendants based on her religion or as

a member of a class, assuming that the unendorsed candidates could or did constitute a class. GRIFFIN v. BRECKENRIDGE, 403 U.S. 88 (1971); ARNOLD v. TIFFANY, 487 F. 2d 216, 218 (9th Cir. 1973).

In COLLINS v. HARDYMAN, 341 U.S. 651 (1959), the Supreme Court, in its consideration of an alleged violation of the predecessor section of 1985(3), held that private discrimination is not inequality before the law "...unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so" (at Pg. 661). Plaintiff's complaint fails to demonstrate any such manipulation.

PLAINTIFF'S RIGHTS UNDER THE FOURTEENTH AMENDMENT WERE NOT VIOLATED.

The federal courts have repeatedly held that the protection extended to citizens by the privileges and immunities clause of the Fourteenth Amendment includes those rights and privileges which, under the laws and Constitution of the United States are incident to citizenship of the United States. It does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. SNOWDEN v. HUGHES, 321 U.S. 1, 7; MAXWELL v. BUGBEE, 250 U.S. 525, 528.

The Supreme Court in SNOWDEN, supra, reiterated the principle that the right to become a candidate for a state office, like the right to vote for the election of state officers, is a

right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause. Similarly, the denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause or a denial of equal protection. TAYLOR & MARSHALL v. BECKHAM, 178 U.S. 548.

POINT II

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. 1983.

Section 1983 reads as follows:

> "Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. § 1979.)

In appraising plaintiff's complaint in the light of Section 1983, the language of the court in AUBUT v. MAINE, 431 F. 2d 688, at 689, that this section, like habeas corpus, is not ".. a general form of relief for those who seek to explore their case in search of its existence," is indeed appropriate. Stated plainly, plaintiff has no case under 1983.

This court, in ALBANY WELFARE RIGHTS ORGANIZATION DAY CARE CENTER, INC. v. SCHRECK, 463 F. 2d 620 (2nd Cir. 1972), had under consideration a dismissal of the plaintiff's complaint on the ground that it failed to allege facts sufficient to state claims upon which relief could be granted. Plaintiff there asserted that their constitutional right to associate with the center's executive director (Boddie) and to due process and equal protection were violated by the refusal of SCHRECK, as Commissioner of Social Services, to refer children to the center. Boddie contended that her right of free speech under the First and Fourteenth Amendments was denied by this alleged refusal.

The court, in affirming the dismissal as a matter of law, again held that mere conclusory allegations are inadequate to state a claim under 1983. It referred to its decision in AVINS v. MANGUM, 450 F. 2d 932 (2nd Cir. 1971), in reiterating that conclusory allegations of politically motivated discrimination are insufficient as a matter of law to state a claim. That language is equally applicable to the case at bar where the complaint fails to provide any substance for the bare bones claim that plaintiff's rights of free speech and free association were violated by defendants KAYE and PRESIDENT'S COUNCIL. Thus, plaintiff concededly chose not to be screened by the parent groups in District 25; plaintiff chose to attend only two of the four candidates nights and she makes no claim (nor can she) that she didn't have access to all of the eligible voters in this election

as did all of the candidates.

In sum, plaintiff's complaint fails to demonstrate any due process violation by these defendants.

In BIRNBAUM v. TRUSSELL, 371 F. 2d 672, at 676 (2nd Cir. 1966), this court said:

> "It may very well be true that appellant would not have been discharged if he were a Negro. Nevertheless the fact remains that other white doctors were not discharged. It is thus apparent that appellees cannot be charged with discriminating between whites and Negroes and discharging the former; nor does a simple showing of unequal application of the law make out a violation of Sec. 1985(3) even if it is malicious."

This reasoning is equally applicable to plaintiff's complaint under 1983. Here plaintiff concedes that although she failed to win election, another candidate, STANLEY WITTY, who also ran without any endorsement from PRESIDENT'S COUNCIL or a parent association, managed to win a seat on the COMMUNITY SCHOOL BOARD (App. Pg. 17, 33). Similarly, some of the parent association-endorsed candidates were not elected.

Not every conflict in an educational setting creates a substantial federal question under the Civil Rights Acts. LOPEZ v. LAGINBILL, 483 F. 2d 486 (10th Cir. 1973), cert. denied 415 U.S. 927, 94 S. Ct. 1436, 39 L. Ed. 2d 485.

This is especially so here, where plaintiff's complaint is a conglomeration of vague and conclusory assertions (FLETCHER v. HOOK, 446 F. 2d 14 [3rd Cir. 1971], LOVERN v. COX, 374 F. Supp. 32 [W.D. Va. 1974]), vague and general references to conspiracy,

and a total absence of any demonstrated facts that the actions of these defendants caused plaintiff to suffer any damage.

DEFENDANTS PRESIDENT'S COUNCIL AND KAYE ARE NOT LIABLE TO PLAINTIFF FOR DAMAGES.

In BRISCOE v. KUSPER, 435 F. 2d 1046 (7th Cir. 1970), the Circuit Court determined that the procedure employed by the Board of Election Commissioners of the City of Chicago were unconstitutional and deprived plaintiffs of due process of law under the Fourteenth Amendment. However, it refused to hold the Election Commissioners liable in damages, saying:

> "Even without broad judicial immunity, damages are inappropriate where defendant officials have acted out of good faith and upon reasonable grounds" (at Pgs. 1057, 1058).

Defendants concededly acted pursuant to Circular 57. Even assuming that Circular 57 was constitutionally flawed, defendants should be granted the same qualified immunity accorded by the court to the election officials in the cited case. To do otherwise is to leave parents who participate in school board elections completely exposed to suits for damages for legitimately acting within the ambit of their permissible discretion under a flawed statute or regulation. To place parents in such a predicament is to virtually insure their refusal to participate in school affairs and to frustrate the major purpose of the decentralization of our school system.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DISMISSING THE COMPLAINT SHOULD BE AFFIRMED WITHOUT LEAVE TO AMEND.

Respectfully submitted,

STANLEY POSESS
Attorney for Appellees
PRESIDENT'S COUNCIL, DISTRICT #25, QUEENS, and DOROTHY KAYE

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

DOROTHY WECHTER

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at Bor. of Manhattan, City & State of N.Y.

That on the 24th day of November, 19 75

deponent served the within APPELLEES' BRIEF

upon RUTH E. BUCK, Appellant Pro Se, at 33-38 163 Street Flushing, NY 11358, and upon

~~XXXXXXXXX~~ W. BERNARD RICHLAND, ESQ. CORPORATION COUNSEL, CITY OF NEW YORK, MUNICIPAL BUILDING - Room 1735, NEW YORK, NEW YORK 10007, Att: William P. DeWITT, ESQ., Assistant Dorporation Counsel,

in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in – a ~~post office~~ – official depository under the exclusive care and custody of the United States post office department within New York State.

Dorothy Wechter

Dorothy Wechter

Sworn to before me,

this 24 day of November, 19 75

STANLEY POSESS
Notary Public, State of New York
No. 41-8414525
Qualified in Queens County
Commission Expires March 30, 1977